**IN THE COURT OF APPEALS OF THE STATE OF IDAHO**

**Docket No. 34117**

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| **STATE OF IDAHO,** | ) | **2009 Unpublished Opinion No. 476** |
| | ) | |
| **Plaintiff-Respondent,** | ) | **Filed: May 27, 2009** |
| | ) | |
| **v.** | ) | **Stephen W. Kenyon, Clerk** |
| | ) | |
| **JOHN DOE,** | ) | **THIS IS AN UNPUBLISHED** |
| | ) | **OPINION AND SHALL NOT** |
| **Defendant-Appellant.** | ) | **BE CITED AS AUTHORITY** |
| | ) | |

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Judgment of conviction on three counts of trafficking in cocaine, affirmed.

Greg S. Silvey, Kuna, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

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GRATTON, Judge

John Doe appeals from the judgment of conviction entered upon a jury verdict finding him guilty of three counts of trafficking in cocaine. Idaho Code §§ 37-2732B(a)(2), 18-204. He contends that the district court erred in denying his objection to the State's peremptory challenge of a potential juror in violation of *Batson v. Kentucky*, 476 U.S. 79 (1983). He also contends that the district court erred by allowing testimony of an undercover police officer regarding Doe's mental state. We affirm.

## I.

## FACTS AND PROCEDURAL BACKGROUND

Doe sold cocaine to an undercover police officer on three separate occasions and was charged with three counts of trafficking in a controlled substance. A jury found him guilty on all counts. The district court imposed concurrent sentences of fifteen years with five years determinate on the first count, seventeen years with five years determinate on the second count, and twenty-five years with twelve years determinate on the third count.

During voir dire, the prosecutor used a peremptory challenge to dismiss the only African American venire member from the jury. Doe is also an African American. Doe objected based upon *Batson.* The State responded that it exercised the peremptory challenge because of the potential juror's criminal record. The district court overruled the objection finding that the State had offered a credible race-neutral explanation for the use of its peremptory challenge and that Doe had failed to carry his burden of proving purposeful discrimination.

Doe's defense at trial was that he was entrapped by the undercover officer. He testified that he was taking various prescription drugs for depression, anxiety and some type of personality disorder, which affected his judgment and caused him to be confused and not thinking clearly. Doe admitted to the drug deals but claimed that he only engaged in them after being repeatedly hounded by the undercover officer and a confidential informant to do so. On rebuttal, the undercover officer testified that he had been trained in dealing with individuals with diminished mental capacities including those individuals who are disorderly, disturbed, and suicidal. The officer was asked whether he had ever noticed any personality disorder in his meetings with Doe, to which Doe's defense counsel objected as calling for a medical opinion. The district court overruled the objection based upon the officer's training and observations. The officer testified that, in his opinion, Doe did not have a mental disorder and that Doe never appeared to not know what he was doing. At the close of trial, the court instructed the jury that the officer's testimony did not represent a medical opinion but only the officer's opinion as a law enforcement officer and was admitted for the sole purpose of explaining the detective's state of mind and impressions of the defendant while involved in the transactions.

## II.

## ANALYSIS

### A. Peremptory Challenge.

This Court set forth the analysis under *Batson* in *State v. Owen*, 129 Idaho 920, 931-932, 935 P.2d 183, 194-195 (Ct. App. 1997), as follows:

> In *Batson,* the United States Supreme Court held that the discriminatory use of peremptory challenges, which functionally serves to exclude an individual from jury service on account of his or her race, is a violation of equal protection under the U.S. Constitution. *Batson,* 476 U.S. at 85, 106 S.Ct. at 1716-17. Inasmuch as a "person's race simply 'is unrelated to his fitness as a juror,'" a venireperson has a right not to be excluded from jury participation on account of his or her race. *Batson,* 476 U.S. at 87, 106 S.Ct. at 1718, *quoting from Thiel v.*

*Southern Pacific Co.*, 328 U.S. 217, 227, 66 S.Ct. 984, 989, 90 L.Ed. 1181 (1946). The prohibition against such discrimination applies with equal force whether the party exercising the peremptory challenge is a governmental or private litigant. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991).

*Batson* dictates that a trial court, when faced with the possibility that a party has exercised a peremptory challenge in a discriminatory fashion, must apply the following three-part test. First, the party objecting to the peremptory challenge must make a prima facie showing that the challenge was exercised on the basis of race. *Batson*, 476 U.S. at 94, 106 S.Ct. at 1721-22; *see also United States v. Seals*, 987 F.2d 1102, 1108 (5th Cir. 1993), *cert. denied*, 510 U.S. 853, 114 S.Ct. 155, 126 L.Ed.2d 116 (1993). Second, if the prima facie showing is made, the burden shifts to the party attempting to exercise the peremptory challenge to articulate a race-neutral explanation for its decision. *Batson, supra.* Third, if a race-neutral explanation is tendered, the trial court must then determine whether the party attacking the peremptory challenge has met its burden of proving a purposeful discrimination based on race. *Id.*; *Purkett v. Elem*, 514 U.S. 765, ----, 115 S.Ct. 1769, 1770-71, 131 L.Ed.2d 834, 839 (1995), *petition for reh'g denied*, 515 U.S. 1170, 115 S.Ct. 2635, 132 L.Ed.2d 874 (1995).

To establish a prima facie case of discrimination, the challenged venireperson must be a member of a cognizable racial group. *Batson*, 476 U.S. at 96, 106 S.Ct. at 1723. It is not necessary for the party contesting the peremptory challenge to be of the same racial group as the challenged member of the venire panel, but in such cases a court will scrutinize more closely the use of the peremptory challenge because the rights of both the party and the prospective juror are implicated. *Powers v. Ohio*, 499 U.S. 400, 415, 111 S.Ct. 1364, 1373, 113 L.Ed.2d 411 (1991). Next, the party against whom the challenge is used is entitled to rely on the fact that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Batson, supra*, 476 U.S. at 96, 106 S.Ct. at 1723, *quoting Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 892, 97 L.Ed. 1244 (1953). Finally, the facts and relevant circumstances must raise an inference that the peremptory challenge was being used to exclude a member of the venire from the jury based upon race. *Id.*; *see also United States v. Castro-Romero*, 964 F.2d 942, 943 (9th Cir.1992); *State v. Araiza*, 124 Idaho 82, 87, 856 P.2d 872, 875 (1993).

Cognizable or identifiable racial groups are those which have historically been subjected to discriminatory treatment and have from time to time required aid from the courts in securing equal treatment under the law. *Hernandez v. Texas*, 347 U.S. 475, 478, 74 S.Ct. 667, 670, 98 L.Ed. 866 (1954). For the purpose of applying the *Batson* equal protection analysis, we accept that a person of African American descent is a member of a cognizable racial group. *Batson*, 476 U.S. at 85.

After Doe objected based on *Batson* to the State's peremptory challenge, the district court noted for the record that the potential juror was the only individual on the jury panel who was obviously of African American descent. The prosecutor gave the following explanation for exercising the peremptory challenge:

> [The potential juror] was singled out from the State's perspective before we even appeared in court today, and that's based on his criminal record. He has a PV. He had a no-contact order arrest that ended up getting dismissed. He had a battery and a failure to appear, another battery that I don't know what the disposition was on that, a disturbing the peace, a guilty conviction on that, and a driving while suspended arrest. And so based on that, the State didn't feel like he would be a good juror in this case since he doesn't seem to be a law abiding citizen.

Defense counsel then argued:

> Judge, I don't think that there was any -- I understand that she has those -- privy to those criminal records of the jury, but I don't recall any questioning going to him or any questioning to the kind as far as, like, criminal suit or anything that he might be able to explain whether he was truly the person that was the defendant or accused in those -- in those cases.

Under the first step in the *Batson* analysis, the district court, having determined that the potential juror was the only individual on the jury panel who was obviously of African American descent, found that Doe had made a prima facie showing that the challenge was exercised on the basis of race. Turning to the second and third steps in the *Batson* analysis, the district court held:

> The State . . . stated the basis for the challenge . . . was based on the defendant's prior arrest record and failure to appear in a proceeding in which he was involved. The explanation given by the State gives a basis for the challenge which is race neutral as is required to survive a *Batson* challenge . . . .
>
> The Court, based upon a review of the law and after hearing the record that was established by the parties, finds that the State's stated race neutral basis for the challenge is both a reasonable basis to exercise the peremptory challenge, and the Court finds that the defense has failed to meet the required burden of proof, that the exclusion was exercised upon a purposeful discrimination based on race.

Doe argues that the State's criminal record explanation for excluding the potential juror was pretextual. As noted, Doe argued below that the State did not question the potential juror to confirm that the criminal record being consulted was indeed that of the potential juror or to provide an opportunity to explain the record. Doe argues on appeal that the State intentionally

did not clarify the extent of the criminal record because at least three of the alleged offenses did not result in conviction or the State did not know their ultimate disposition. Thus, the prosecutor's statement that the potential juror, based upon the criminal record, was not a good citizen and would not be a good juror was overstated and pretextual. Doe asserts that in regard to those instances that reflect an arrest but no disposition, the juror enjoys a presumption of innocence and, moreover, misdemeanants and even felons whose civil rights have been restored are good enough citizens to be jurors.

A potential juror's criminal record has consistently been held to be a race-neutral justification for the use of a peremptory challenge in other jurisdictions; *see State v. Porter*, 391 S.E. 2d 144, 151 (1990) (Upholding peremptory challenges for several venirepersons that had been prosecuted for a DUI, the Supreme Court of North Carolina stated that, "courts commonly allow prosecutors to challenge venirepersons who have criminal records or relatives with criminal records."); *Bang v. State*, 620 So.2d 106 (Ala. Ct. App. 1993) (A venireperson's previous conviction for possession of marijuana constituted a valid race-neutral reason.); *Feddiman v. State*, 558 A.2d 278 (Del. 1989) (The use of a peremptory challenge for a venireperson that had a number of felony charges with no disposition and a number of misdemeanor convictions and a peremptory challenge for a venireperson with a DUI was upheld.); *People v. Caine*, 630 N.E. 2d 1037 (App. Ct. Ill. 1 Dist. 1994) (A conviction for robbery or theft is a race-neutral reason for excluding a venireperson from the jury.); *United States ex rel. Rice v. Washington*, 987 F. Supp. 659 (N.D. Ill. 1997) (Three of the challenged jurors were legitimately excused because they were convicted of crimes, one from a conviction of disorderly conduct).

Trial courts have broad discretion in formulating the necessary framework for evaluating explanations given by the State for the use of peremptory challenges after a *Batson* objection. Since the trial court's evaluation will depend largely upon determinations of credibility, the trial court's finding with regard to the State's explanation will be overturned on appeal only if it is clearly erroneous in light of the facts as a whole. *Owen*, 129 Idaho at 932, 935 P.2d at 195. The credibility determination referred to in *Batson* includes the trial court's perception of the validity of the prosecutor's explanation for exercising peremptory challenges on minority jurors. *State v. Araiza*, 124 Idaho 82, 87, 856 P.2d 872, 877 (citing *United States v. Lewis*, 837 F.2d 415 (9th Cir. 1988), *cert. denied*, 488 U.S. 923 (1988). The district court is in a better position than we

are to determine the motivation of the State in challenging these jurors. *Owen*, 129 Idaho at 933, 935 P.2d at 196. Even if the arrests which ended in dismissal or unknown disposition are disregarded, the potential juror's criminal record included a PV, a battery, a failure to appear, and a disturbing the peace. The district court's findings that the State's justification for striking the potential juror was race-neutral and that Doe failed to meet his burden of proving a purposeful discrimination based on race have not been shown to be clearly erroneous.

**B. Lay Opinion Testimony.**

Doe contends that the district court abused its discretion by allowing the undercover officer to testify regarding his impressions of Doe's mental condition during the drug transactions. The admissibility of opinion testimony is largely discretionary with the trial court and the determination of the weight of the evidence is a matter for the jury. *State v. Curry*, 103 Idaho 332, 339, 647 P.2d 788, 795 (Ct. App. 1982). Idaho Rule of Evidence 701 provides that a trial court may allow a lay witness to state an opinion about a matter of fact within his or her knowledge, so long certain conditions are met:

> If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

The decision to admit opinion testimony will not be disturbed on appeal absent an abuse of discretion. *State v. Enyeart*, 123 Idaho 452, 454, 849 P.2d 125, 127 (Ct. App. 1993). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

At trial, Doe testified that he was on medications for depression, anxiety and some type of personality disorder that affected his judgment. He claimed that the undercover officer knew of his condition and the effects the medications had on him and took advantage of that. He further claimed that he is easily persuaded and everyone knew it. In rebuttal, the prosecutor

asked the undercover officer if he had any specialized training in working with people. He replied:

> I do. Part of my duties as detective with the police department through undercover investigations. Aside from that, I am also one of the lead hostage negotiators and crisis negotiators for the Boise Police Department. I've been trained through the FBI in crisis negotiations and dealing with individuals with mental capacities who are disorderly, disturbed, suicidal. And I've also been trained through the state, through the Department of Health and Welfare, as well as dealing with disturbed and mentally challenged individuals . . . . My duties are to decide whether or not -- what actions are needed in dealing with individuals as to what their mindset is at the time.

Thereafter, the following exchange occurred:

> [Prosecutor]: In all of those meetings with [Doe], did you notice any personality disorder or --
>
> [Officer]: No. I believed him to be a very --
>
> [Defense Counsel]: Judge, I'm going to object. Is he proffering medical testimony?
>
> [The Court]: The court will allow the witness to testify. I will overrule the objection. The witness may not give a medical opinion, but he may give his opinion as a trained officer as to whether he observed anything. The weight to be given the evidence is for the jury.
>
> [Prosecutor]: Okay.
>
> [Officer]: It is my opinion in the five years of negotiations and crisis interventions and my experience as a 15-[year] veteran in law enforcement that [Doe] - in my opinion had no mental disorders at all.
>
> [Prosecutor]: Did he ever appear like he didn't know what he was doing?
>
> [Officer]: No.

The court correctly ruled that the officer could not give a medical opinion but would be allowed to testify as to his personal observation of Doe's conduct. However, the officer's testimony that Doe "in my opinion had no mental disorders at all," stated a medical opinion, not merely the officer's observations of Doe's behavior. Accordingly, the officer's testimony improperly stated a medical opinion, exceeded the court's ruling and the confines of I.R.E. 701 and, with a proper objection, should have been stricken.

At the close of trial, the court instructed the jury:

> You were allowed to hear testimony from [the undercover officer] that he observed no mental disorders as to the defendant in his dealings with the defendant. You are advised that this testimony does not represent a medical opinion but only [the undercover officer's] opinion as a law enforcement officer. It was admitted for the sole purpose of explaining the detective's state of mind

> and impressions of the defendant while involved in these transactions. What weight, if any, you give to this evidence is for you, alone, to determine.

The district court's instruction to the jury served to limit the testimony to some extent. However, even accepting that admission of this testimony was error Doe is not entitled to relief. Error is not reversible unless it is prejudicial. *State v. Stoddard*, 105 Idaho 169, 171, 667 P.2d 272, 274 (Ct. App. 1983). Thus, we examine whether the alleged error complained of in the present case was harmless. *See State v. Lopez*, 141 Idaho 575, 578, 114 P.3d 133, 136 (Ct. App. 2005). To hold an error harmless, this Court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that the evidence complained of contributed to the conviction. *State v. Sheldon*, 145 Idaho 225, 230, 178 P.2d 28, 33 (2008). Applying this standard, while submission of the officer's testimony to the jury was error, because of the overwhelming weight of the evidence supporting the jury's verdict and the ameliorative effect of the court's limiting instruction, we hold that the error was harmless.

## III.

## CONCLUSION

The district court's decision to deny Doe's objection under *Batson* was not clearly erroneous. The admission of the undercover officer's opinion that Doe had no mental disorders at all was harmless error. Doe's judgment of conviction is affirmed.

Chief Judge LANSING and Judge PERRY, **CONCUR.**